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Supreme Court, U.S.
FILED
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No.

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IN THE SUPREME COURT OF THE UNITED STATES

-OCTOBER TERM, 1990

In re Crystal Dawn K., a minor,

CYNTHIA LYNN WINN, Petitioner

vs.

JOSEPH ALEX KOMPKOFF, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, STATE OF CALIFORNIA

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QUESTION PRESENTED

1. Whether the Third District Court of Appeal for the State of California extended the reach of the Indian Child Welfare Act ("ICWA")("the Act") beyond the intent of Congress and the plain meaning of the Statute when it interpreted Section 1912 (d) & (f) of "the Act" to apply to a termination proceeding in which the child was not in the custody of an Indian, was not a tribal member, was not living on the reservation, and the proceeding involved no removal from a tribe or Indian parent involved.

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vs.

JOSEPH ALEX KOMPKOFF, Respondent[1]

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, STATE OF CALIFORNIA

Petitioner, Cynthia Lynn Winn, prays that a writ of certiorari issue to review the Judgment and Opinion of the Court of Appeal, Third Appellate District entered March 19, 1991 and to sustain the Judgment of the Superior Court, County of Trinity.

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[1]/ All of the parties in the Court of Appeal, Third Appellate District are listed in the caption.

OPINIONS BELOW

The opinion of the Court of Appeal, Third Appellate District, State of California (App. A, infra, 1a - 44a) is reported at 226 Cal.App.3d 655 and the subsequent Petition for Review before the Supreme Court, State of California was denied (App. A, infra, 45a) and is not reported.

JURISDICTION

The Judgment of the Superior Court, County of Trinity (App. A, infra, 46a-60a) has been reversed by the opinion of the Court of Appeal, Third Appellate District, State of California (App. A, infra, 1a - 44a) which was entered on

December 24, 1990. A timely Petition for Review to the Supreme Court of California was denied on March 14, 1991 (App. A, infra, 45a). The State appellate remedies have been exhausted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 25 U.S.C. §1902 Indian Child Welfare Act provides:

> "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal

standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs."

2. 25 U.S.C. §1903 Indian Child Welfare Act specifies, in relevant part:

"For the purposes of this chapter, except as may be specifically provided otherwise, the term --

(1) "child custody proceeding" shall mean and include:

(i) "foster care placement" which shall

mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action

resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an

> Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon ... an award, in a divorce proceeding, of custody to one of the parents."

STATEMENT

Crystal Dawn Kompkoff is the child of Cynthia Lynn Winn who was formerly married to a member of the Native Village of Chanega. Crystal is thus part Indian and part non-Indian. She was never a member of the tribe, never lived on the reservation, and since the parties'

dissolution of marriage in 1983, she has been in the custody of her mother. Since her mother's re-marriage, she has been raised by her step-father and her mother.

After a considerable period of time, the Winns have applied to the court to allow Crystal to be adopted. In this connection, it was necessary to terminate the natural father's custody and control and that proceeding led to this appeal.

REASONS FOR GRANTING THE PETITION

The Indian Child Welfare Act ("ICWA"), ("the Act") has as its laudable purpose the protection of Indian families and tribes so that members may not be

removed from the family or the tribe without stringent procedures being followed.

In most cases, a party seeking to terminate parental rights to an Indian child must satisfy the court that active efforts have been made to provide remedial measures to prevent break-up of the family and that they have been unsuccessful (§1912 (d)) and that the continued custody of the child by the parent is likely to result in serious emotional (or physical) damage to the child (Section 1912(f)).

The facts of this case highlight the conflict which is inherent when those laudable requirements are applied to persons outside the reach of the tribe or

the Indian family. If only because the individuals possess the blood quantum which would entitle them to tribal membership they are required to meet these stringent standards, great hardship is imposed without any benefit to tribe or family. Thus, the interpretation of the Court of Appeal could require individuals in numerous unrelated cases to comply with the provisions of the Indian Child Welfare Act when there had been no other connections with either an Indian tribe or reservation other than the potential of tribal membership due to the blood quantum.

If this interpretation of the law is allowed to stand, it is apparent that the

reach of the law is extended considerably beyond the intention of Congress and the plain meaning of the Statute.

The Superior Court of the State of California in and for the County of Trinity in case number 87JU 041 issued a Decision on January 5, 1989, which interpreted the federal statutes under 25 U.S.C. Section 1912 **not** to prevent the termination of the natural father's parental rights under the circumstances presented. That decision was appealed to the Third District Court of Appeal, State of California by the natural father on April 21, 1989. The Third District Court of Appeal of the State of California interpreted the federal sections

differently to require additional findings under 25 U.S.C. Section 1912 subparagraphs (d) & (f).

It is the Petitioner's position that the Court of Appeal's interpretation is incorrect and exceeds the plain meaning of the statute as well as being contrary to the purpose for which congress enacted the law in the beginning. It is for this reason that Petitioner sought a hearing before the Supreme Court of the State of California on January 25, 1991 and was denied such a hearing on March 14, 1991. Petitioner now seeks a Writ of Certiorari from this court based upon the foregoing grounds.

The Court of Appeal's interpretation

goes considerably beyond the declared purpose of Section 1902 of the Indian Child Welfare Act. The stated purpose is to establish minimum federal standards for the removal of Indian Children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture and thus promote the stability and security of Indian tribes and families (§1902). In this particular case, the only removal of an Indian child from her family occurred at the time of the dissolution of marriage which was in 1983. Under Section 1903 of "the Act", it is clear that a placement based upon an award in a dissolution proceeding is <u>not</u>

included within the terms of a child custody proceeding which would be subject to control by "the Act". Therefore, the mother could have been given sole custody at that time without complying with the standards fixed by §1912 (d) & (f), and the adoption could have proceeded without having to file a termination proceeding under Civil Code Section 232.

Nevertheless, because Crystal meets the definition of an Indian child, the Court of Appeal held "the Act" applies to these termination proceedings commenced several years later thus requiring that Sections 1912 (d) & (f) be satisfied. This places an impossible burden upon parties who have never been a part of the

Indian tribe and extends the power of the Indian tribe far beyond the reach it would have even apart from any such proceedings. Thus, it is apparent that if the interpretation of the Court of Appeal stands, the power of tribes to control non-tribal affairs would be considerably increased.

The principal effect here in this instance and in the many similar instances which could be visualized, is to deny access to the state courts of all of those people who are by blood, Indian, but who do not live on the reservation nor are they members of tribes, nor have they ever been removed from the tribe or family by

any such means as are enumerated in "the Act". It also denies access to the non-Indian relatives in proceedings such as this which have historically been the State's province. By insisting that the standards be applied in all cases where the blood quantum is sufficient to qualify for tribal membership, the non-Indian aspects of the individual as well as the relatives are denied fulfillment. The child is held in an Indian status regardless of these other legitimate considerations.

At the time "the Act" was being considered by Congress, the attorney general raised a serious question regarding the constitutionality of the

section the Court of Appeal extends to these facts. In a letter from the Department of Justice dated May 23, 1978, quoted in the legislative history at page 7740, the following appears with respect to the sections now enumerated as 1912 (d) & (f).

> "As we understand section 102, it would, for example, impose these detailed procedures on a New York State court sitting in Manhattan when that court was adjudicating the custody of an Indian Child and even though the procedures otherwise applicable in this State-court proceeding were constitutionally sufficient. While we think that

Congress might impose such requirements on State courts exercising jurisdiction over reservation Indians pursuant to Public Law 83-280 we are not convinced that Congress' power to control the incidents of such litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause is sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter. It seems to us that the Federal

> interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by section 102. See Hart, "The Relations Between State and Federal Law, " 54 Colum.L.Rev.489,508 (1954). Legislative History of Public Law 95-608, pages 7740, 7741.

This present case is not an isolated situation. It is necessary from the standpoint of those similarly situated to clarify the limits of the Indian Child Welfare Act. As the Court of Appeal

points out in its opinion, there has been very little authority thus far on which to base a decision and therefore it is important for the Supreme Court of the United States to clarify this aspect of the law.

CONCLUSION

In light of the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted,

ALFRED S. WILKINS,
Counsel for Petitioner

May, 1991

APPENDIX A

THE DECISIONS BELOW

Here are set forth, successively, the Judgment and Opinion of the Courts of Appeal, Third Appellate District; the Order of the Supreme Court of California denying petitioner's Petition for Review; the Judgment and Opinion of the Superior Court, County of Trinity.

CERTIFIED FOR PUBLICATION

- C O P Y -

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(TRINITY)

3 Civil C006504
(Super.Ct.No. 87 JU 041)

In re Crystal Dawn K., a minor,	)
	)
CYNTHIA LYNN W.,	)
	)
Petitioner and Respondent,	)
	)
v.	)
	)
JOSEPH ALEX K.,	)
	)
Respondent and Appellant.	)

APPEAL from a judgment of the superior court of the County of Trinity, John K. Letton, Judge. Reversed and remanded with directions.

California Indian Legal Services, Mary J. Risling for Objector and Appellant.

Alfred S. Wilkins for Petitioner and Respondent.

Joseph Alex K. appeals from a judgment declaring Crystal Dawn K. free from his parental custody and control (Civ. Code, § 232). Joseph contends that certain minimum federal standards applicable to termination of parental rights to an Indian child as set forth in the Indian Child Welfare Act of 1978 25 U.S.C. §§ 1901 et. seq., [1]/ ("the Act" or "IWCA") were not met necessitating a reversal of the judgment and a dismissal of the petition. We hold that the act is applicable to a petition by an Indian child's non-Indian mother to terminate the parental rights of the child's Indian

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[1]/ All further references to undesignated code sections are to 25 United States Code.

father. We shall reverse and remand with directions.

FACTS

Crystal was born on December 5, 1981, in Anchorage, Alaska. In October of 1982, Crystal's mother and father, Cynthia and Joseph, separated. Cynthia and Crystal moved to Trinity County and Cynthia obtained a dissolution of marriage on November 30, 1983. Cynthia married Jeffrey W. on May 22, 1985, and gave birth to twins on November 1, 1986.

On November 9, 1987, Cynthia filed a petition to have Crystal declared free from Joseph's parental custody and control. She alleged that Joseph had not provided any support for the minor since April of 1983, and had virtually no

contact with the minor.

On December 14, 1987, counsel was appointed for Joseph. On December 28, 1987, the Native Village of Chanega (Native Village) moved to intervene alleging it is a federally recognized Indian tribe, that Crystal was a member of the tribe, and that the ICWA authorized the Indian child's tribe to intervene at any point in a state court proceeding. The court granted Native Village's motion to intervene.

Native Village moved for judgment on the pleadings on the grounds that the petition failed to state facts sufficient to constitute a cause of action in that the petition did not show compliance with minimum federal standards for termination

of parental rights as required by the ICWA. The court granted the motion with leave to amend.

In her amended petition, Cynthia alleged that Joseph drank to excess, was abusive to her, and that they separated only after all remedial and rehabilitative efforts failed. She further alleged that Crystal did not know her father, had never lived with him since she was one year old, considered Jeffrey W. her father, and that the continuation of Joseph's custodial rights would likely result in serious emotional or physical injury to the minor.

At trial, the parties stipulated that the termination of the parent and child relationship would result in the minor's loss of membership in the Native

Village and all benefits of such membership including higher education benefits.

Cynthia testified that Joseph did not work but rather "played" during the time they lived together in Alaska. She claimed he had a drinking problem which in part caused their separation. During the marriage, she attempted to help correct his problem as did his mother but he only got angry and would not admit he had a problem. Concerning Joseph's subsequent attempts to solve his drinking problem, Cynthia relied on Joseph's statement given to the social worker that he hoped to be working soon upon completion of an alcohol rehabilitation program.

Cynthia claimed that Joseph spoke

with Crystal about three times over the telephone, wrote no letters to Crystal, and sent her support payments only during the first year. Cynthia stated that Crystal was aware that she was part Indian. Although she claimed she was not adverse to Crystal knowing more about her heritage, Cynthia did not intend forcibly to educate Crystal about her cultural ties. Cynthia knew the termination of the parent and child relationship between Joseph and Crystal meant the loss of Crystal's membership in the Native Village.

Jeffrey W. claimed Crystal considered him to be her father and he desired the termination of Joseph's parental rights. However, if termination

did not occur, he intended to treat Crystal as a member of his family and as his daughter. Based on his own personal computations, he claimed he was three-eights Cherokee. He was not a member of the Cherokee tribe, did not participate in any Indian benefits such as educational benefits, and did not know the eligibility criteria for participation in any federal programs available for Indian people. He, like his parents and grandparents, desired to make it on his own without any assistance from the government. He knew Crystal would lose eligibility for federal benefits if the parent-child relationship was severed. He offered to provide Crystal with whatever she needed.

Trinity County Mental Health

clinical psychologist Donald Williams interviewed Cynthia and Crystal. He met with Crystal once for 45 minutes in a clinical setting but performed no psychological testing. He never conversed with Jeffrey in a clinical setting nor with Joseph. Dr. Williams claimed be spoke with Mr. Brody, a former member of the Hoopa tribe, for Indian background information. Dr. Williams did not specifically know anything about Brody's background but recalled that Brody did some work in the Hoopa area and was familiar with Indian culture and heritage. While he found Crystal and Jeffrey to have bonded to one another, he did not foresee any serious emotional problem for Crystal if that relationship was never legalized.

He considered Crystal already to be psychologically a part of her present family and to remove her would cause a serious emotional problem. However, maintaining the status quo would not result in any serious emotional or physical harm to Crystal.

Upon the conclusion of Cynthia's evidence, Joseph and the Native Village moved for judgment pursuant to Code of Civil Procedure section 631.8 claiming Cynthia failed to meet the substantial burdens imposed by the ICWA. The Court declined to grant the motion based on its lack of certainty of the provisions of the ICWA and requested the parties to present their evidence.

Royal Earl Alsup, a clinical

psychologist who specialized in ethnic and Indian psychology, opined that the termination of the parental rights and tribal rights would result in serious psychological and emotional problems for the Indian child due to the loss of identity in terms of self-esteem and emotional needs. Although not an Indian himself, Dr. Alsup's wife is Yurok and Hoopa and their children are Indian. He also concluded that the well-being of Indian people demanded that they not be severed from their Indian culture because it has been shown that they turn against the culture in which they are raised and end up without an identity. He considered a treatment plan for an alcoholic Indian person to differ from a treatment plan for

a non-Indian person in that it would have to suit the tribal culture and involve Indian value systems. He opined that the termination of the tribal rights would harm the Indian child. Dr. Alsup also believed rehabilitation efforts were required before termination of Joseph's parental rights.

The Native Village presented a Department of Interior, Bureau of Indian Affairs' (BIA) certification of the degree of Indian blood proving Joseph is four quarters Aleut.

The court in its tentative decision granted the petition, finding Joseph had abandoned the minor and that it would be detrimental for the child within the meaning of California law to not grant the

petition. (Civ. Code § 232, subd. (a)(1).) The court determined that the Act was inapplicable. The Native Village objected to the proposed statement of decision as contrary to law. The court overruled the objections and entered a decree terminating Joseph's parental custody and control.

DISCUSSION

Relying on Mississippi Band of Choctaw Indians v. Holyfield (1989) 490 U.S. _____ [104 L.Ed.2d 29, 109 S.Ct. ____] and In re Junious M. (1983) 144 Cal.App.3d 786, Joseph contends that the ICWA is applicable to the instant proceedings. Our review of the Act's various provisions leads us to conclude the same.

In adopting the ICWA, Congress made the following findings:

"(1) that clause 3, section 8, article I of the United States Constitution provides that 'The Congress shall have Power ... To regulate Commerce ... with Indian tribes' and through this and other constitutional authority, Congress has plenary power over Indian affairs;

"(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

"(3) that there is no resource that is more vital to the continued existence

and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

"(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

"(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have

often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." (§ 1901.)

Congress included in the Act its policy statement:

"The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance

to Indian tribes in the operation of child and family service programs." (§ 1902.)

As succinctly noted in In re Appeal in Pima County Juvenile Action (Ariz.App. 1981) 130 Ariz. 202 [635 P.2d 187, 188]: "In the [ICWA], Congress declared a two-fold national policy: the protection of the best interests of Indian children, and the promotion of stable and secure Indian tribal entities. 25 U.S.C.A. § 1902."

To effectuate the purposes of the Act, "child custody proceeding[s]" (§ 1903 (1)) involving the "foster care placement" (§ 1903 (1)(i)), "pre-adoptive placement" (§ 1903 (1)(iii)) or "adoptive placement" (§ 1903 (1) (iv)) of an "Indian child" (§ 1903 (4)), or the "termination of parental rights" (§ 1903 (1)(ii)) to an Indian

child are subject to specific federal procedures and standards. No one disputes that Crystal is an Indian child under the Act. The issue is whether this parental termination proceeding is subject to the Act's specific procedures and standards.

Under the Act, the child custody proceeding involving a "termination of parental rights" means "any action resulting in the termination of the parent-child relationship." (§ 1903 (1)(ii).) Two types of child custody proceedings are specifically excluded from the Act; (1) custody disputes resulting from divorce proceedings between parents of an Indian child; and (2) placements of Indian children resulting from juvenile delinquency actions. (§ 1903; A.B.M. v.

M.H. (Alaska 1982) 651 p.2d 1170, 1173.)

BIA has issued guidelines for state courts in Indian child custody proceedings. (44 Fed.Reg. 67584-67595 (Nov, 26, 1979) (hereinafter Guidelines).) The Guidelines were "not published as regulations because they [were] not intended to have binding legislative effect." (44 Fed.Reg. 67584.) In its tentative decision, the trial court referred to the Guidelines as "consistently interpret[ing] the Act as applying to cases where the primary issue is whether or not an Indian child might be removed from an Indian parent or Indian custodian." The Guidelines, however, did not interpret the Act as excluding the present proceedings. We quote extensively

from the Guidelines:

"B.3. Determination That Placement is Covered by the Act

"(a) Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.

"(b) Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.

"(c) Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand." (44 Fed.Reg. 67587.)

As commentary, the Guidelines offered the following:

"The purpose of this section is to deal with some of the questions the Department has been receiving concerning the coverage of the Act.

"The entire legislative history makes it clear that the Act is directed

primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child--whether on a permanent or temporary basis. Although there is some overlap, juvenile delinquency proceedings are primarily designed for other purposes. Where the child is taken out of the home for committing a crime it is usually to protect society from further offenses by the child and to punish the child in order to persuade that child and others not to commit other offenses.

".....

"While the Act excludes placements based on an act which would be a crime if committed by an adult, it does cover terminations of parental rights even where

they are based on an act which would be a crime if committed by an adult. Such terminations are not intended as punishment and do not prevent the child from committing further offenses. They are based on the conclusion that someone other than the present custodian of the child should be raising the child. Congress has concluded that courts shall make such judgments only on the basis of evidence that serious physical or emotional harm to the child is likely to result unless the child is removed.

"The Act excludes from coverage an award of custody to one of the parents 'in a divorce proceeding.' If construed narrowly, this provision would leave custody awards resulting from proceedings

between husband and wife for separate maintenance, but not for dissolution of the marriage bond within the coverage of the Act. Such a narrow interpretation would not be in accord with the intent of Congress. The legislative history indicates that the exemption for divorce proceedings, in part, was included in response to the views of this Department that the protections provided by this Act are not needed in proceedings between parents. In terms of the purposes of this Act, there is no reason to treat separate maintenance or similar domestic relations proceedings differently from divorce proceedings. For that reason the statutory term 'divorce proceeding' is construed to include other domestic

relations proceedings between spouses." (44 Fed.Reg. 67587-67588.)

In order to exclude the proceeding from application of the Act, the trial court determined that the Civil Code section 232 action is "inextricably tied to the divorce proceeding." This view is simply incorrect and ignores the plain language of the section. A "child custody proceeding" for purposes of the Act includes "any action resulting in the termination of the parent-child relationship." (§ 1903 (1)(ii), emphasis added.) The excluding language, i.e., "a placement based ... upon an award, in a divorce proceeding, of custody to one of the parents" (emphasis added), on its face means a custody dispute involving a

placement in a divorce proceeding. Congress delineated the only exclusions and judicially created exclusions cannot be added. (In re Junious M., supra, 144 Cal.App.3d at p. 796; A.B.M. v. M.H., supra, 651 P.2d at p. 1173; In re Custody of S.B.R. (Wash.App. 1986) 719 P.2d 154, 156.)

The trial court deemed the Act inapplicable essentially because the court believed this parental termination proceeding was a private matter between Crystal's parents analogous to a divorce proceeding. This view was grounded in belief that the Act applies only to custody proceedings involving the removal of Indian children from their homes by non-family entities. In short, the view

is that the Act does not apply to intra-family custody disputes. This view of the Act's scope was squarely rejected in A.B.M. The A.B.M. court reasoned that Congress clearly excepted just two child custody proceedings from the Act--divorce proceedings and juvenile delinquency actions. Since one of these clear exceptions--divorce proceedings--involved internal family disputes, Congress was obviously aware of the issue but nevertheless chose to limit the exception. According to the court in A.B.M., no compelling reasons existed to imply any other exceptions. (A.B.M. v. M.H., supra, 651 P.2d at pp. 1172-1173).

True, A.B.M. disagrees with In re Bertelson [(Mont. 1980) 617 P.2d 121] in

arriving at this decision. Bertelson involved a child custody dispute between a non-Indian mother and Indian paternal grandparents. In finding the Act inapplicable to such a situation, the Bertelson court reasoned: The Act is not directed at disputes between Indian families regarding custody of Indian children; rather, its intent is to preserve Indian culture values under circumstances in which an Indian child is placed in a foster home or other protective institution." (617 P.2d at p. 125.) Furthermore, in In re Adoption of Baby Boy L. (Kan. 1982) 231 Kan. 199 [643 P.2d 168], the Kansas Supreme Court held the Act inapplicable to an adoption proceedings involving a non-Indian

mother's illegitimate child. The Baby Boy L. court refused to allow the father's tribe and the paternal grandparents to intervene in the proceeding, reasoning that the "overriding concern of the Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother." (643 P.2d at p. 175)

However, neither Bertelson nor Baby Boy L. involved a proceeding to terminate --on abandonment grounds for the sake of stepparent adoption--the parental rights of an Indian parent to his legitimate Indian child with whom the parent had lived for nearly a year following the child's birth.

We think the purpose of the ICWA set forth the sections 1901 and 1902--to govern the removal of Indian children from their families through the application of standards that recognize the distinct Indian culture--is broad enough to encompass the parental termination proceeding before us. It can be reasonably argued that even the Baby Boy L. court's characterization of the Act's

purpose--maintaining family and tribal relationships existing in Indian homes and setting minimum standards for the removal of Indian children from their existing Indian environment--applies to the facts before us.

The California decisions on this subject are sparse and do not provide much guidance. In In re Junious M., supra, 144 Cal.App.3d at p. 796, the court held the Act applicable to a Civil Code section 232 proceeding filed by the county to terminate the parental rights of a mother of a child she contended was Indian. The appellate court took the trial court to task for refusing to apply the Act because the minor had developed no identification as an Indian. Citing A.B.M., the court in

Junious stated that the Act contained no such exception and it was inappropriate to create such an exception judicially. In In re Wanomi P. (1989) 216 Cal.App.3d 156, the court deemed the Act inapplicable because the tribe at issue was not officially recognized and did not reside on a reservation and the child at issue was not an Indian child and was not a resident or domiciliary of an Indian reservation. (216 Cal.App.3d at pp. 166-169.) Wanomi did not involve specifically a parental termination proceeding but rather was a child dependency case under California Welfare and Institutions Code section 300. In this milieu, the Wanomi court cited with approval the Baby Boy L. court's characterization of the ICWA as

primarily concerning the maintenance of the family and tribal relationships existing in Indian homes and the establishment of minimum standards for the removal of Indian children from their existing Indian environment. (Id. at p. 168.) To the extent Wanomi narrowly construes "Indian home" and "removal," we disagree with that court on the facts before us for the reasons that follow.

A broader view of the Act accords with the Act's characterization in Pima, a characterization approved of by the United States Supreme Court in Holyfield. Pima stated the purpose of the Act was to establish minimum federal standards applicable to Indian child custody proceedings to prevent the separation of

Indian children from their family, tribal and cultural heritage. (635 P.2d at p. 188) According to Pima, "[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected". (Id. at p. 189; emphasis added.) Holyfield stated this conclusion "seems justified," noting that "the concerns that emerged during the congressional hearings on the ICWA were based on studies showing recurring developmental problems encountered during adolescence by Indian children raised in a white environment." (104 L.Ed.2d at p. 47, fn. 24; see also In re Custody of S.B.R., supra, 719 P.2d at p. 156.)

In his testimony, Dr. Alsup echoed

these concerns. Although he did not claim to be an expert on native tribes in Alaska, Dr. Alsup had some clients from there and had extensive experience and knowledge in working with Indian children separated from their Indian culture. The severing of Indian parental and tribal ties, said Alsup, substantially harmed the emotional, security and identity needs of the Indian child involved. According to Alsup, an identity crisis often emerges in adolescence for the Indian child raised in a white culture in the absence of any Indian link. This crisis is typically exemplified in the following pattern. Powerful internal and external forces propel Indian children to seek their Indian connection. If that connection is

completely severed by the Indian child's white family, the child grows to resent the family; however, the child's culture is essentially white and so connecting with the Indian way of life and thinking is also foreclosed. As one commentator has put it: "The child becomes a person without a culture: distinguishable by race from the dominant culture, but not equipped with social and cultural values that are necessary to live in the Indian culture." (The Indian Child Welfare Act of 1978: Provisions and Policy (1980) 25 S.D. L. Rev. 98, 114-115.)

Limiting the Act's applicability solely to situations where non family entities physically remove Indian children from actual Indian dwellings deprecates

the very links--parental, tribal and cultural--the Act is designed to preserve.

We now turn to the issue of how the specific standards set forth in section 1912, subdivisions (d) and (f) apply here. We begin with section 1912, subdivision (d).[2] That section requires Cynthia to show that remedial and rehabilitative efforts designed to prevent the breakup of the Indian family were undertaken and that these efforts proved unsuccessful. We do

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[2] 25 United States Code Service, section 1912, subdivision (d) provides: "Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

not construe this provision, as did the trial court, to mean that Cynthia must show there were active efforts to provide remedial and rehabilitative services at or about the time of her separation from Joseph six years ago. Rather, Cynthia must prove that there were active efforts to provide such services subsequent to her separation from Joseph and the dissolution of their marriage. This is because the remedial efforts must be directed at remedying the basis for the parental termination proceeding against Joseph: his alleged abandonment of Crystal. This abandonment occurred after Cynthia and Joseph's separation and presumably continues to this day.

This view of section 1912,

subdivision (d), aligns with the Guidelines. According to the Guidelines, the phrase in the Act "breakup of the Indian family" does not mean divorce but instead a situation in which an Indian parent is unable or unwilling to raise the child in a healthy manner emotionally or physically. (44 Fed.Reg. 67592, Guideline D.2, Commentary.) As concisely noted in Pima, section 1912 (d) is simply directed at "attempt[s] to preserve the parent-child relationship." (635 P.2d at p. 193.)

Cynthia can meet this remedial and rehabilitative services requirement by proving, for example, that efforts have been made to contact the tribe to assist in maintaining the relationship between

Joseph and Crystal, or that efforts have been made to enroll Joseph in child care, alcohol dependency, or similar social programs geared to native Alaskan culture or Indian culture, and that Joseph has spurned these efforts. (See In re P.B. (S.D. 1985) 371 N.W.2d 366, 372; 44 Fed.Reg. 67592, Guideline D. 2; This Indian Child Welfare Act of 1978: A Practitioner's Perspective (1986) 62 N.D. L. Rev. 487, 522, fn. 224.)

That brings us to section 1912, subdivision (f), which requires Cynthia to prove that "continued custody" of Crystal by Joseph is likely to result in serious

emotional or physical damage to Crystal.[3]/ "Custody" is not defined in the Act. But in defining "Indian custodian," the Act distinguishes legal custody from physical custody. Section 1903, subdivision (6) provides: "'Indian custodian' means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the

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[3]/ 25 United States Code Services, section 1912, subdivision (f) provides: "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

parent of such child.) The Act thus recognizes different types of custody. (SER Juvenile Dept. v. England (Or, 1982) 292 Or. 545 [640 P.2d 608, 611-613].) And since an Indian parent is certainly afforded no less rights under the Act than an Indian custodian (cf. § 1903, subds. (6) and (9)), the use of "continued custody" in section 1912, subdivision (f), must encompass more than simply actual physical custody. (See SER Juvenile Dept., supra, at pp. 611-613.) Such an interpretation is also consistent with the Act's purpose to preserve the Indian child's link to his or her Indian family, tribal and cultural heritage. (In re Appeal in Pima County Juvenile Action, supra, 635 P.2d at p. 188.)

The trial court refused to apply section 1912, subdivision (f), because Crystal had not recently been in Joseph's physical custody and had not been removed from him pursuant to a court order. This decision to limit the term "custody" under section 1912, subdivision (f), to physical custody of the child was erroneous and precluded the court from determining what, if any, legal custody Joseph may have under State law or tribal law or custom. Until such a determination is made the applicability of section 1912, subdivision (f), to Joseph is unclear.

Although he did not have physical custody, Joseph had some type of legal parenting relationship with Crystal. We do not have Cynthia and Joseph's

dissolution decree before us, nor evidence regarding whether Joseph has any legal custody under tribal law or custom. Accordingly, we do not know the nature of Joseph's parenting rights. In California, the term "legal custody" is a wide-ranging concept encompassing a variety of parenting arrangements. (See Civ. Code, § 4600.6.) In light of our above analysis, section 1912, subdivision (f), must be construed to mean whether the evidence establishes beyond a reasonable doubt that Crystal would likely experience serious emotional or physical harm if Joseph retained the legal and/or physical custody provided him under State law or tribal law or custom. (See SER Juvenile Dept. v. England, supra, 640 P.2d at p. 613; In re

W. R. (Minn.App. 1985) 379 N.W.2d 544, 549.) As with section 1912, subdivision (d), the trial court's erroneous construction of the Act precluded a finding based upon section 1912, subdivision (f).

We reverse and remand to the trial court to make the requisite findings under the Act (25 U.S.C. § 1912, subds. (d) and (f)) consistent with the views expressed in this opinion. Should any party desire to present additional evidence in light of our interpretation of section 1912, subdivisions (d) and (f), the trial court shall hold a supplemental hearing for that purpose prior to rendering its findings.

DAVIS, J.

We concur:

PUGLIA, P.J. CARR, J.

Third Appellate District No. C006504

S019374

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

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In re CRYSTAL DAWN K., A Minor

CYNTHIA LYNN W., Respondent

v.

JOSEPH ALEX K., Appellant

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Petition for review DENIED.

Mosk, J. and Arabian, J. are of the opinion the petition should be granted.

LUCAS
Chief Justice

THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TRINITY

NO. 87JU 041

IN RE THE MATTER OF THE PETITION OF CYNTHIA LYNN WINN on behalf of CRYSTAL DAWN KOMPKOFF to Declare Minor Free from Parental Custody and Control (Civil Code 232)

ANNOUNCEMENT OF TENTATIVE DECISION
RULE 232

PROCEDURAL BACKGROUND

This action was filed by the natural mother of Crystal Dawn Kompkoff, date of birth 12/5/81, seeking termination of the parental rights of the natural father pursuant to Civil Code section 232. The original petition did not refer to the minor as an Indian child, nor did it

contain allegations related to the requirements of the Indian Child Welfare Act ("the Act"). A motion to intervene by the Native Village of Chanega was granted, and the intervenor also moved for judgment on the pleadings due to the original petition's lack of allegations relating to 25 U.S.C. Section 1912, subparagraphs (d) and (f). These motions were granted, and petitioner then filed an amendment to the petition which contained allegations related to Section 1912 subparagraphs (d) and (f).

EVIDENCE

The minor was born on December 5, 1981 in Anchorage, Alaska. Her father Joseph Alex Kompkoff, Jr. is an Aleut Indian and a member of Native Village of

Chanega. The minor's parents separated ten months after her birth, and were divorced shortly thereafter. Prior to separation the minor's parents lived in Alaska, sharing an apartment with another couple and then living with the father's parents. Following separation, the mother and child moved to California where the divorce action occurred. The mother describes the father as having an alcohol abuse problem, which got worse during the year prior to separation. In the words of the mother the father did not work but was "playing" most of the time.

Shortly after the mother and child moved to California the father visited them for about one week. During the five plus years since then he has talk to the

child a few times on the telephone. He sent support during the first year following separation, but has not voluntarily provided any support since 1983. Since then, one child support payment was received by the mother through a "D.A. withholding".

With regard to the father's alcohol problem, prior to separation the mother talked to him about drinking, but he denied the problem and "got mad". Several times in telephone conversations she urged him to "get help", but to no avail. The social worker report prepared pursuant to Civil Code section 233 mentions that the father had problems with drinking to excess and became abusive toward the mother. The report also quotes

the father as saying that he "...hopes to be working this Spring (Spring, 1988) after he completes an alcohol rehabilitation program...".

The mother remarried about three and one half years ago, and has two year old twins by that marriage. The child has a close relationship with her stepfather; she calls him "Daddy" and considers him her real father. She is aware of "Joe" (natural father) and has expressed some interest in her Indian heritage. "How much Indian am I?". She has asked.

The father did not appear at trial but was represented by appointed counsel throughout the case.

There is no evidence that the child has ever been removed from the custody of

a parent by court order or a county child protective agency. The clear purpose of the present termination action is to free the child for adoption by her step-father.

THE LAW

Were it not for consideration of the Indian Child Welfare Act the section 232 petition would be granted without hesitation. It is clear that the natural father has abandoned the child, within the meaning of California law. It would be in the child's best interest for the petition to be granted. It would be detrimental to the child for the petition not be granted.

The Department of the Interior has published "Guidelines for State Courts-Indian Child Custody Proceedings" which

are promulgated by the Department to assure that the rights guaranteed by the Indian Child Welfare Act are protected when state courts decide Indian Child Custody matters. Federal Register, volume 44, Number 228, November 26, 1979. The Guidelines represent administrative interpretations of the Act, and are to be given important, but not controlling significance by state courts. The Guidelines consistently interpret the Act as applying to cases where the primary issue is whether or not an Indian child might be removed from an Indian parent or Indian custodian. The Act itself, also, appears to be drafted to address those situations where Indian children might be removed, or had temporarily been removed,

from the custody of an Indian parent or Indian custodian. In other words, the Act was intended to apply to juvenile court dependency cases where removal of an Indian child was an issue and/or parental rights termination cases which follow removal of an Indian child in a dependency action. The Act focuses on the dangers which cross cultural differences pose to Indian children, Indian parents, and Indian tribes. In blunt words, the Act reflects the salutory purpose of mitigating the imposition of "white man standards" on Indian families where there is a threat of removal of an Indian child from an Indian parent or Indian custodian through the actions of a child protective agency.

25 U.S.C. section 1912 (d) states that "any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proved unsuccessful.". This requirement is logically applicable to a situation where the Indian child may be removed from the natural parent and/or an Indian cultural environment if the termination of parental rights is granted. In the present case, the child has been with her natural mother, and away from her natural father, since she was ten months

old. She is living in a stable family environment with her mother, stepfather, and the two younger children of their marriage. To apply subsection (d) of section 1912 to this fact situation would be illogical. In fact, requiring the mother to satisfy subsection (d) would require proof that there was an active effort to provide remedial services and rehabilitative programs at or about the time of her separation from ex-husband in Alaska six years ago. If no such services were then being provided in Alaska, then the abandonment by the father could never result in a termination of parental rights. While the provision of remedial services and rehabilitative programs is extremely important, and should be

fostered by proper application of the Act, the application of subsection (d) to the present fact situation would yield an unintended result.

Subsection (d) is interpreted to apply to cases involving potential termination of parental rights where either 1.) the child
has been removed from the custody of an Indian parent or custodian by a child protective agency and/or court order, and/or 2.) the Court in which the termination is sought has a practical opportunity to order that remedial services and rehabilitative programs be provided. Therefore, Subsection (d) does not apply to this case.

Subsection (f) of Section 1912

requires proof beyond a reasonable doubt, including testimony of qualified expert witnesses, that continued custody by a parent or Indian custodian is likely to result in serious emotional or physical damage to a child before there can be a termination of parental rights (emphasis added). Subsection (f), like subsection (d), logically applies to situations where the child is, or has recently been, in the custody of the Indian parent or Indian custodian. Since the Act was obviously drafted on the assumption that it would only apply to cases where there was an attempt to remove an Indian child from an Indian parent or Indian custodian by Court order, Subsection (f) is interpreted to apply only to such cases.

If the Act were interpreted to apply to the present case, then it would also apply to many other situations which could not have been intended. For example, if subsections (d) and (f) were interpreted as broadly as is now argued by the Native Village, they might even apply where an Indian custodial parent was attempting to terminate the parental rights of a non-Indian non-custodial parent.

In the present case there is proof beyond a reasonable doubt there is no custody by an Indian parent or Indian guardian and that actual custody of the child by the natural father would be likely to result in serious emotional; and/or physical damage to the child. To complete the record, I do not find proof

beyond a reasonable doubt that the Indian father's continued right to have contact with the child would likely to result in serious emotional or physical damage to the child.

It is noted that certain actions of the Native Village of Chanega are perplexing at best. It was stipulated at trial that under the laws of the Native Village if the father's parental rights are terminated then the child will lose membership in the Native Village and all benefits related to membership. This rule of the Native Village is singled out here because the Native Village also presented evidence that severing an Indian child's cultural identity is potentially damaging to the child. It appears that the Native

Village has unilaterally chosen to severe the cultural identity of Indian children who happen to have been reared in situations where the facts, which certainly are not the fault of the children, lead to a termination of the Indian parent's parental rights. Thus the law established by the Tribal Council appears to be potentially damaging to Indian children, although in fairness to the Tribal Council there may be legitimate policy reasons for the law which were not explained at trial.

CONCLUSION

The petition is granted.

DATED: January 5, 1989.

JOHN K. LETTON
Judge of the
Superior Court

91-114 (2)

Supreme Court, U.S.
FILED
AUG 5 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

In re Crystal Dawn K., a minor,

CYNTHIA LYNN WINN, Petitioner

vs.

JOSEPH ALEX KOMPKOFF, Respondent

On Petition for a Writ of Certiorari to the Court of Appeal, Third Appellate District, State of California

RESPONDENT'S BRIEF IN OPPOSITION

JOSEPH A. KOMPKOFF, JR.
Respondent
P.O. Box 1
Cordova, Alaska 99574

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On Petition for a Writ of Certiorari to the Court of Appeal, Third Appellate District, State of California

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The principal issue in this case is whether the Indian Child Welfare Act, 25 U.S.C. §1901 et seq., and its provisions relating to termination of parental rights,

specifically section 1912 subsections (d) and (f), apply to a proceeding brought by one parent to terminate the parent-child relationship between an Indian parent and his Indian child. After careful analysis, the Court of Appeal for the Third Appellant District held that the Indian Child Welfare Act does indeed apply to such a proceeding and reversed the decree terminating the Indian father's parental rights. The opinion of the Court of Appeal is attached to petitioner's petition as Appendix A (hereinafter "Pet. App.")

This court need not hear this case because the Court of Appeal's decision is correct and, further, the Court of Appeal's decision is wholly consistent with state and federal law.

STATEMENT OF THE CASE

Respondent Joseph Kompkoff is a full-blooded Aleut. Pet. App. 11a. He is a member of the Native Village of Chanega.

Pet. App. 47a. The Native Village of Chanega is a federally recognized Indian tribe. Pet. App. 3a

Crystal Dawn Kompkoff, the child of petitioner Cynthia Winn, and respondent Joseph Kompkoff, is 1/2 degree Aleut and a member of the Native Village of Chanega. Crystal was born on December 5, 1981, in Alaska, where she lived with her parents and paternal relatives until her parents separated approximately ten months after her birth. Following separation, the mother and child moved to California where a divorce action occurred. The mother subsequently re-married. Pet. App. 2a.

On November 9, 1987, Cynthia Winn filed a petition pursuant to Civil Code Section 232 in Trinity County Superior Court to declare her daughter Crystal free from the custody and control of respondent.

Ibid. The clear purpose of the petition is to free the child for adoption by her step-father. Pet. App. 51a.

On December 14, 1987, counsel was appointed for respondent. Pet. App. 3a. Shortly thereafter, on December 28, 1987, the Native Village of Chanega moved to intervene alleging that Crystal Dawn Kompkoff is an Indian child covered by the Indian Child Welfare Act and that under the Act the Tribe is entitled to intervene. Ibid. On January 25, 1988, the court granted the Tribe's motion to intervene under the Indian Child Welfare Act, 25 U.S.C. Sec. 1900 et seq. Pet. App. 3a.

The Tribe moved for judgment on the pleadings due to the original petition's lack of allegations relating to 25 U.S.C. Section 1912, subparagraphs (d) and (f). These motions were granted, and petitioner then filed an amendment to the petition. Pet. App. 47a. The amended petition

alleged that the petitioner had separated from Crystal's father "only after all remedial and rehabilitative efforts had failed", and that to continue the custodial rights of JOSEPH ALEX KOMPKOFF, JR., is likely to result in serious emotional or physical damage to said child. Pet. App. 4a.

A hearing on the amended petition was held October 3, 1988. Mr. Kompkoff, who lives in Alaska, could not attend but appeared by counsel. Pet. App. 50a. All parties proceeded under the assumption that the Indian Child Welfare Act applied and that its standards would have to be met before the petition could be granted. The petitioner and her husband testified. In addition, a psychologist testified as a witness for the mother. Pet. App. 8a. At the close of petitioner's case the respondent's counsel called a second psychologist who testified concerning the

psychological effects of severing the child's ties with her Indian parent and tribe. Pet. App. 9a-11a. Both psychologists testified that it would be detrimental to Crystal to terminate respondent's parental rights.

On January 5, 1989, the court announced its tentative decision. Pet. App. 46a. Counsel for the intervenor, Native Village of Chanega, filed objection to the proposed statement of decision. On February 21, 1989, the court signed a decree declaring Crystal free from her father's custody and control on the grounds he had abandoned the child within the meaning of Civil Code Section 232. In an accompanying ruling on the intervenor's objections to his proposed statement of decision, the court ruled that the Indian Child Welfare Act did not apply to the case.

The Court of Appeal, Third Appellant District, in a comprehensive opinion, reversed and remanded. Pet. App. 1a-44a. The Court of Appeal rejected the trial court's characterization of the termination of parental rights proceeding as a private matter between the child's parents, similar to a divorce proceeding and hence not covered by the Act. It held that the Indian Child Welfare Act is indeed applicable and that the standards set forth in section 1912 (d) and (f) apply to this proceeding to terminate the father's parental rights.

A petition for review to the California Supreme Court was denied. Pet. App. 45a. This petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

The Decision of the Court of Appeal is correct and does not conflict with any decision of this Court or any other California appellate court.[1] It is wholly consistent with the Act, its legislative history and the liberal interpretation of the Act approved by the United States Supreme Court in Mississippi Band of Choctaw Indians v. Holyfield, (1989) 490 U.S. 30 [104 L.Ed.2d, 109 S.Ct.1597]. It is consistent with other post Holyfield cases applying the Act.[2] No further review is warranted.

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1. As pointed out by the Court of Appeal, the fact that the proceeding at issue herein is an action to terminate parental rights, and that Crystal Kompkoff is a member of a federally recognized Indian tribe, distinguishes this case from In re Wanomi P., (1989) 216 Cal.App.3d 156.

2. See, Matter of Adoption of Baade (S.D. 1990) 462 N.W. 2d 485; In Re Adoption of Lindsay C. (1991) 280 Cal. Rptr. 194.

1. The Court of Appeal correctly concluded that the Indian Child Welfare Act applies to this proceeding.

The Indian Child Welfare Act is expressly made applicable to the following child custody proceedings involving an Indian child: foster care placements, 25 U.S.C. §1903 (1)(i); pre-adoptive placements, 25 U.S.C. §1903 (1)(iii); adoptive placements, 25 U.S.C. §1903 (1)(iv); and, termination of parental rights, 25 U.S.C. §1903 (1)(ii). Expressly excluded from the definition of child custody proceeding are "a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. §1903 (1).

25 U.S.C. § 1903(1)(ii) defines "termination of parental rights" as "any action resulting in the termination of the

parent-child relationship." 25 U.S.C. §1903 (4) defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

Contrary to petitioner's surprising assertion that this case involves a child who is not a member of a tribe, the record makes it abundantly clear that Crystal is a tribal member. The record reflects the Native Village of Chanega's unequivocal determination that Crystal is a member of that tribe. Pet.App. 3a,4a-5a,6a. This fact is not in dispute. In any event, The Tribe's determination is conclusive. In re Junious M., 144 Cal.App. 3d 786, 793, 193 Cal.Rptr. 40, 44 (1st Dist. 1983); Bureau of Indian Affairs, Guidelines for State Courts, Indian Child Welfare Custody Proceedings, 44 Fed.Reg. 67584, 67586 (Nov.

26, 1979); see Santa Clara Pueblo v. Martinez, (1978) 436 U.S. 49,62-66, 98 S.Ct. 1670, 1679-81, 56 L.Ed.2d 106.

In order to exclude the proceeding from application of the Act, the trial court determined that the Civil Code section 232 action is "inextricably tied to the divorce proceeding." Pet. App. 24a. As correctly noted by the Court of Appeal:

> this view is simply incorrect and ignores the plain language of the section. A "child custody proceeding" for purposes of the Act includes "any action resulting in the termination of the parent-child relationship." (§ 1903 (1)(ii), emphasis added.) The excluding language, i.e., "a placement based...upon an award, in a divorce proceeding, of custody to one of the parents" (emphasis added), on its face means a custody dispute involving a placement in a divorce proceeding. Congress delineated the only exclusions and judicially created exclusions cannot be added. (In re Junious M., supra, 144 Cal.App.3d at p. 796; A.B.M. v. M.H., supra, 651 P.2d at P.1173; In re Custody of S.B.R. (Wash.App. 1986) 719 P.2d 154, 156.)

Pet. App. 24a-25a.

2. The appeals court correctly concluded that 25 U.S.C. §1912, subsections (d) and (f) apply to this proceeding.

Although he did not have physical custody, as the Court of Appeal correctly noted, Joseph has some type of legal parenting relationship with Crystal. Hence, the need to bring a petition to terminate his custody and control of his daughter. It is this relationship that subsections (d) and (f) apply to.

Petitioner misstates the facts and the law when she asserts that Sections 1912 (d) and (f) should not apply to this proceeding but should be limited because the mother could have been given sole custody at the time of the divorce "without complying with the standards fixed by §1912 (d) & (f), and the adoption could have proceeded without having to file a termination proceeding under Civil Code Section 232. Pet. 14. The awarding of legal and physical custody

in a dissolution action is not synonymous with termination of parental rights, and the purpose of a dissolution and termination action are not the same. An award of even sole legal and physical custody in a dissolution action does not result in the termination of a the parent-child relationship between the child and the non-custodial parent. Such a result requires a separate action, an action that is subject to the Indian Child Welfare Act when an Indian child is involved.

The appeals court correctly construed section 1912, subdivision (d) and (f) to apply to this proceeding. Under subdivision (d), Petitioner is required to show active and timely efforts to provide remedial and rehabilitative services directed at remedying the basis for the parental termination, and that these efforts were unsuccessful. Pet. App.

36a-39a. The reference to "break up of the Indian family" does not require that the child be in the physical custody of the Indian parent as a prerequisite to application of the subsection. Rather, section 1912 (d) is simply directed at "attempt[s] to preserve the parent-child relationship." In re Appeal in Pima County Juvenile Action, (Ariz.App. 1981) 130 Ariz. 202; 635 P.2d 187, 193. Cited with approval by the U.S. Supreme Court in Mississippi Band of Choctaw Indians v. Holyfield, (1989) 490 U.S. 30 [104 L.Ed.2d 29, 109 S.Ct. 1597]

The Court of Appeal provided examples of very reasonable undertakings a private party could pursue to meet the burden of 1912 (d). Pet. App. 38a-39a. Thus, petitioner's assertion that "an impossible burden" is placed on parties seeking to impact the Indian family and tribal relationship is simply not true.

Similarly, subdivision (f) was interpreted by the Court of Appeal "to mean whether the evidence establishes beyond a reasonable doubt that Crystal would likely experience serious emotional or physical harm if Joseph retained the legal and/or physical custody provided him under State law or tribal law or custom." Pet. App. 43a.

As noted by the appeals court, "custody" means something more than mere physical custody. While the term itself is not defined in the Act, it appears in several places. The definition of "Indian Custodian" set forth in section 1903 (6) of the Act expressly recognizes different types of custody, distinguishing between "physical" and "legal" as determined by State or Tribal law or custom. Pet. App. 40a-41a.

3. Petitioner's argument questioning the constitutionality of the Act is not persuasive.

First, concern that parties will be denied access to state courts is particularly curious in this case in that the issue is minimal standards to be applied only in state court proceedings.

Second, concerns regarding blood quantum as a nexus for applicability of the Act are irrelevant in that Crystal is a member of her Tribe.

The constitutionality of the Act was discussed at great length in the legislative history and the concerns expressed by petitioner fully addressed. See H.R. Report No. 95-1386, 95th Cong.2d Sess. (1978), reprinted in [1978] U.S. Code Cong. and Ad.News 7530, 7534-7541. Additionally, several cases have considered and upheld the constitutionality of the Indian Child Welfare Act. See In Matter of

Appeal in Pima County, 635 P.2d 187 (Ariz.Ct.App. 1981), cert.den. 455 U.S. 1107 (1982); Angus v. Joseph, 655 P.2d 208 (Oregon App. 1982), pet.den. 660 P.2d 683, cert.den. 464 U.S. 830, 78 L.Ed.2d 109, 104 S.Ct.107(1983).

4. The decision of the Court of Appeal is consistent with the intent and purpose of the Act.

Petitioner asserts that the narrow focus and purpose of the Act is to establish minimum federal standards for the removal of Indian children "so that members may not be removed from the family or the tribe without stringent procedures being followed." Pet. 8-9. While removal safeguards are an important aspect of the Act, the actual purpose is that correctly noted by the Court of Appeal, citing In re Appeal in Pima County Juvenile Action, (Ariz.App. 1981) 130 Ariz. 202 [635 P.2d 187, 188]: "In the [ICWA], Congress

declared a two-fold national policy: the protection of the best interests of Indian children, and the promotion of stable and secure Indian tribal entities. 25 U.S.C.A. §1902." Pet. App. 16a.

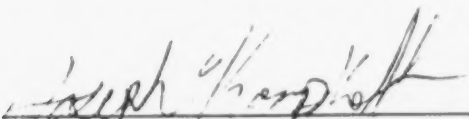
The means to accomplish the purpose of the Act and to promote the national policy the Act reflects, among other things include the minimal federal standards set forth in the Act. However, these standards are but "minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe." House Report at 19. The decision of the Court of Appeal is consistent with the terms and purpose of the Act as reflected on its face and in its legislative history.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: July 30, 1991

Respectfully submitted.



Joseph Kompkoff, Respondent
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